

TENNESSEE ADR NEWS

A Publication of the Tennessee Supreme Court Alternative Dispute Resolution Commission
Summer 1999

Vol. 1, No. 4

New TennCare Law Creates Mediation Opportunity

Rule 31 listed mediators may be needed to review claim disputes between TennCare HMOs/BHOs and providers.

With the enactment of Public Chapter 276 in May of 1999, the Tennessee General Assembly created a new mediation procedure for TennCare HMOs/BHOs and providers to resolve claim disputes. Under Public Chapter 276, TennCare providers may request an independent reviewer to resolve the dispute.

Persons interested in serving as an independent reviewer should write:
Sandra Keifert, Compliance Officer
TennCare Division
Department of Commerce and Insurance
500 James Robertson Parkway, Suite 750
Nashville, TN 37243

In your correspondence please provide a resume, evidence of Rule 31 approval, a summary of your experience with health insurance claims, and a fee per claim quote. The deadline for submission is September 10, 1999.

Please be advised that at this time it is unknown how many independent reviewers will be needed. It is also unknown how many provider claims will be submitted for independent review.

If you have any questions, please contact Sandra Keifert at (615) 741-2677 or fax at (615) 532-8872 or skeifert@mail.state.tn.us. Response by fax and email are welcome.

Commission Sponsors

Advocacy in Mediation Training

The ADR Commission, along with the Kingsport, Knoxville, Nashville and Memphis Bar Associations, is sponsoring a statewide "Advocacy in Mediation" training four times during the month of October. Training dates and presenters are:

Kingsport: Bob Campbell
October 5 Shelby Grubbs
Hon. John S. McLellan, III
Kimbrough B. Mullins
Sarah Sheppard

Nashville: Robert S. Brandt
October 11 Shelby Grubbs
Kimbrough B. Mullins
Dorothy J. Ponders
Hon. Marietta M. Shipley

Memphis: Hon. George H. Brown, Jr.
October 18 Bob Campbell
Shelby Grubbs
Kimbrough B. Mullins
Dorothy J. Ponders

Knoxville: Bob Campbell
October 25 Shelby Grubbs
Chancellor Daryl Fansler
Kimbrough B. Mullins
Sarah Sheppard

To register, please contact the participating bar association in your area.

The trainings are designed for lawyers who represent clients in mediation. They will (Continued on Page 2.)

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also be instructional for mediators who mediate cases with lawyers present.

The topics to be covered are: Preparing the Client and Oneself for Mediation; Conducting the Opening Statement as an Advocate; Client's Participation in the Opening Statement; Advocacy During Separate Sessions with the Mediator; Documenting Settlement and Special Problems. Topics will be discussed in relation to both civil and family mediation. One hour will focus on ethical issues. **The training is approved for 2 hours of general and 1 hour of dual CLE credit.**

Nina Meierding to Teach Advanced Family and Civil Training

On October 1, 1999 nationally recognized mediator and trainer Nina Meierding will present 6 hours of advanced mediation training in Nashville. Co-sponsored by the TBA, the ADR Commission and the Mediation Association of Tennessee, the training promises to be a highlight of the training year.

Last year Ms. Meierding's trainings received rave reviews from judges, mediators, and lawyers alike. This year is sure to be no different. Ms. Meierding's training style, energy level and experience with all kinds of mediation make her trainings a pleasure to attend.

The training will be held in the Columbia/HCA Auditorium from 8:30 a.m. until 4:45 p.m. The morning session is entitled "Advanced Family Mediation Skills for High Conflict Cases." The morning session will include the following topics: Working with high-conflict couples, Developing parenting plans in high-conflict cases, Providing protections in martial

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A Word From the Director

By Ann Barker

ADR is Growing in Tennessee

The implementation of Tennessee Supreme Court Rule 31 is now in its third year. The first group of mediators was approved by the ADR Commission in March 1997. Since that first group of 126 mediators, the number of mediators listed by the commission has increased to a total of 558. Of this number, 321 are listed as general civil mediators, 124 are listed as family mediators, and 113 are listed as both. The updated listing of mediators is mailed to all Circuit, Chancery, Probate and General Sessions courts every quarter.

An article on alternative dispute resolution is included in each copy of *Juridicus*, the newsletter for all state judges. The Alternative Dispute Resolution Committee of the Tennessee Judicial Conference keeps the idea before the conference through programs, surveys and ongoing training on judicial settlement conferences.

The number of CLE courses in mediation has skyrocketed, including the series that will be offered by the commission this fall on "Advocacy in Mediation." The Tennessee Bar Association, the Memphis, Nashville, Knoxville, Chattanooga and Kingsport Bar Associations, and the Mediation Association of Tennessee are each sponsoring advanced mediation CLE programs this fall.

This office receives frequent calls from attorneys and litigants inquiring about the availability of mediators in specific locations and asking about the process of mediation. Court clerks from many jurisdictions often request additional copies of the mediation brochure that was published by the commission last year.

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Tennessee Alternative Dispute Resolution Commission

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Send your questions and comments to:

Tennessee Alternative Dispute
 Resolution Commission
 Nashville City Center, Suite 600
 511 Union Street
 Nashville, TN 37243-0607
 Office: 615-741-2687
 Fax: 615-741-6285
 Email: ib271r1@smtpaoc.tsc.state.tn.us

Victim Offender Mediation Conference is Huge Success

By: Rebecca Hill

On August 20 and 21, 1999, in Crossville, Tennessee, more than 75 people, including program directors, staff, board members and mediators from seven centers across the state came together for the first time. The conference allowed time for lots of discussion and fostered a sense of community among the individuals who volunteer and staff victim-offender mediation programs in Tennessee. The banquet on Friday evening featured a keynote address by Carolyn McLeod, Coordinator for the Community Justice Program in Washington County, Minnesota, and member of the National Victim Offender Mediation Association Board of Directors. Ms. McLeod lead an all day advanced mediator training session on Saturday on multi group conferencing. Also on Saturday, Dr. Jim Valliancourt, Director of the Center for Non Profit Management in Nashville, lead a training session for Board Members that focused on how a board can most effectively support a center.

The evaluation forms from the conference unanimously stated that the conference had inspired and improved a sense of purpose among the mediators and supporters who attended. The request was made repeatedly for a similar conference to be held next year.

Rebecca Hill is a Nashville native and a second year law student at the University of Tennessee College of Law in Knoxville. A graduate of Goucher College in Baltimore, she coordinated the VORP Conference.



Mediators on the TBA-Link

All Rule 31 approved mediators are located on the mediation page on the TBA-Link. This link has recently been revised. It now lists all approved mediators in a database format. You now have the capability of doing a search and down loading on any of the fields available. The public access address is: www.tba.org. Choose the category for "Mediation".

Attorneys I Have Known

By Mitchell Aaron Byrd

Over the past 15 months of mediating a range of cases through the Hamilton County Divorce Project, I have been able to identify the following categories of lawyers at mediation sessions.

1.THE SPOILER: This attorney advises his client that mediation is required , but "you do not have to agree" thus setting the Mediation up for failure at the very start by giving the client a "reason" (as if he needed another) not to be in a cooperative and accommodating spirit at the Mediation session. She sometimes sends her client without benefit of counsel to this session, therefore minimizing the importance of the Mediation process.

2.THE CHEAP-SKATE: This attorney whines and complains about the cost of Mediation in dollar amounts, but puts no value on the pain and emotional trauma of domestic litigation. He juggles his fees around the cost of Mediation and decides that if the client can't pay all the fees he will pay him for what he does best, appearances in court, not at the "unimportant" Mediation session. Also this attorney has trouble confronting his client with the real costs of litigation (depositions, court reporters, psychologists, court costs) and pretends that these should not be paid promptly, but his fee should be paid *in advance*.

3.THE PRETENDER: Appears at Mediation and pretends to know the Mediation process, has made no effort to obtain training in the area or even read the Pilot Project Statute. As a result the Mediator must educate the client and the lawyer to the process, thus increasing costs to the client (Mediation and Attorney fees), to explain options the client should know before the Mediation session. When asked by the Mediator to clarify a point of law,

he pretends to know the applicable case law, but yet he has not read a domestic case since the annual seminar and must consult the seminar materials before giving an answer.

4.ARGUMENTATIVE: This lawyer assumes argument is the only true lawyer skill.

He'll argue about the meaning of "affair." Opportunity and inclination mean nothing.

He'll argue about the Child Support guidelines and tell you how unfair they are to his client.

He'll argue about the value of the home and make absurd arguments even when given an appraisal.

He'll argue about income in the future and how uncertain employment with T.V.A. really is.

He'll argue with the Mediator over issues that have been mutually identified by the clients.

He'll argue that infidelity is the only issue and everything depends on this (alimony, parenting plan, child support, property division) and will, with a straight face, argue the value of "she done me wrong".

5.MINDLESS AGENT: This lawyer comes to the Mediation to do only what his client wants him to do, nothing more, nothing less. He does not know what this is until they get to the Mediation. No goals of Mediation have been discussed, no visible or alternative BATNA (Best Alternative to A Negotiation Agreement), no idea of objective criteria for property division, alimony, child support, etc.

This client is either to "sink or swim" based on the information provided or discussed by the Mediator or parties in the mediation session. The client's only answer is, "I can't agree to that without talking to my attorney".

6.ANTAGONIST: Always has an asinine remark to any proposal. In response to a
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request to pay the house payment, he responds, "My client will do that when she moves her lesbian friend out of the house."

In response to a request that she pay child support, she responds, "The boy works and makes his own money, I pay for the car I bought him for his birthday."

7.MOUTHPIECE: Tells his client to say nothing, he'll do all the talking. Believes his client is too stupid to understand the issues, therefore he never identifies and never discusses this with his client. Client reacts to a question from the Mediator like a deer caught in head lights. When asked by the Mediator if he has pictures of his children, he looks at his lawyer for direction.

8.ALTER EGO: This lawyer assumes the role of his client and actually becomes the client. He demonizes the opposing attorney, the spouse, and the judge. He seeks to tell all the "trash" for the past 25 years to the Mediator just to get it off his client's (his) chest.

9. ACTUARY: Must with mathematical certainty calculate every value, pension, pot and pan at the Mediation session. Spends hours trying to estimate present value of pension by calling the employer, pension personnel, or pondering check stubs. Will not agree to his independent expert value of the pension (usually most valuable asset) because it is too expensive (cheap-skate) and then will calculate child support from guidelines, apply deviation and check the calculations in every possible variation and is unable to come up with the same figure twice. Usually does not use or own a calculator, therefore must use his limited knowledge of algebra to make time consuming math calculations.

He will recheck every math calculation in that manner and will not agree to round to the next dollar, but insists on mathematical exactness.

He wants to pro rate his costs because his opponent "ran the cost up" by issuing subpoenas for his client's numerous out-of-wedlock children and the lawyer subpoenaed their biological mothers also(one of which was a blind prostitute from Little Rock).

10.THE WHINER: He whines, snorts, and complains about every detail. He hates being a lawyer and especially hates divorce cases, divorce clients, and the mediation process. His childish attitude spoils the mediation process for everyone. Makes spouse, opposing attorney, and Mediator want to give up just to get rid of him.

11.THE SAGE: This lawyer shows up at every mediation session, prepared to help his client come to a settlement at the mediation. He has been trained in the Mediation process because he knows how important that Mediation skills are to a quick reasonable and fair settlement.

He has prepared his client in advance regarding the issues to be decided and has explained to his client about the Best Alternative to a Negotiation Agreement (BATNA)

The Parenting Plan has been discussed and brochures from MAT and ADR Commission and Parenting Coordinator have been given to his client.

He will encourage his client to be casual, courteous, polite, and to avoid finger pointing, accusations, and the "she done me wrong". These are historical and not productive to an agreement.

His goal will be to arrive at the best agreement possible on as many issues as possible to cut down on the more costly items of Deposition, Expert Witness fees, Court Reporters, Court Time, etc.

He will use objective criteria for evaluations and will have shared these with opposing counsel at least 10 minutes before the Mediation session.

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He will show the utmost respect for all mediation participants and will *insist* that nothing less will be tolerated by him, opposing counsel or the mediator.

He will be the one who is congratulated by the mediator, the client (sometimes, even a hug!) and leaves the mediation session with a good feeling about his work and his contribution to effective gatekeeping of the judicial process.

Moreover, he will know he has tempered his client's hatred with love, his anger with peace, his resentment with forgiveness, and has made every good effort to bring resolution to the dispute.

Mitchell A. Byrd is an attorney and a Rule 31 and MAT approved mediator in Chattanooga.

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settlement agreements and custody plans; What to do when you discover domestic violence; and Ethical considerations of family law mediations for both the "attorney-mediator" and the "therapist-mediator".

The afternoon session is "Advanced Negotiation Skills for Civil Mediators." The afternoon session will include these topics: Dealing with highly-competitive parties; Understanding the "distributive dance"; The power of the opening offers and subsequent moves; How to deal with tactics; How to work with aggressive attorneys in mediation; and Ethical dilemmas for the mediator in assisting the parties in their negotiation "dance".

For more information or to register contact the Tennessee Bar Association at 800-899-6993 or 383-7421 in Nashville, or sign up online at <http://www.tba.org/TennBarU/registrar.html>. Attendance is limited so register early!

Second Annual Judicial Settlement Conference Training Scheduled for Trial Judges

At the request of the Tennessee Judicial Conference, a Judicial Settlement Conference Training has been scheduled for September 28 - 30, 1999 at the Garden Plaza Hotel in Murfreesboro. Thirty state trial judges have been selected to attend the training. The training was made possible through a federal grant obtained by ADR staff to cover 75% of the cost of the training. The ADR Commission donated the 25% matching funds so that the training could go forward.

The training will present negotiation theory, case screening considerations and skill development in conducting settlement conferences. The lead trainer will be Nina Meierding of Pepperdine University. In addition to serving as adjunct faculty at Pepperdine, Ms. Meierding is a mediation instructor at the National Judicial College in Reno, Nevada, and teaches negotiation and dispute resolution courses to governmental and corporate entities throughout the country.

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All of this increased activity leads me to believe that the use of ADR has grown significantly in the past two years. The general public is becoming more aware of the various possibilities for dispute resolution. The legal community is responding by becoming trained in mediation or mediation advocacy techniques. The judiciary has embraced the idea of judicial settlement conferences and mediation.

In November each listed mediator will be mailed a renewal and survey form. The information we receive will greatly assist us in knowing how much ADR is being ordered by the court and used by attorneys and their clients. We look forward to receiving your information so that we can put some real numbers with our anecdotal information.

MEDIATION CLE/CME COURSES AVAILABLE

These trainings will meet the continuing education requirements of Rule 31

CHATTANOOGA

ADVANCED ADR TRAINING (6 HOURS)

November 5, 1999

Sponsored by the Chattanooga Bar Association and the Federal Bar Association

Phone: (423) 756-3222

KINGSPORT

ADVANCED GENERAL CIVIL TRAINING (6 HOURS)

September 9, 1999

Private Dispute Resolution Services

Phone: (423) 894-7050

ADVANCED FAMILY TRAINING (8 HOURS)

September 10, 1999

Private Dispute Resolution Services

Phone: (423) 894-7050

MEDIATION ADVOCACY (3 HOURS)

October 5, 1999

Contact: Kingsport Bar Association and Alternative Dispute Resolution Commission

Phone: (423) 246-1988

KNOXVILLE

MEDIATION ADVOCACY (3 HOURS)

October 25, 1999

Knoxville Bar Association and Alternative Dispute Resolution Commission

Phone: (423) 522-6522

NASHVILLE

ADVANCED MEDIATION TRAINING FAMILY & CIVIL (6 HOURS)

October 1, 1999

Tennessee Bar Association

Phone: (800) 899-6993

MEDIATION ADVOCACY (3 HOURS)

October 11, 1999

Nashville Bar Association and Alternative Dispute Resolution Commission

Phone: (615) 242-9272

MEMPHIS

ADVANCED MEDIATION TRAINING AND WORKSHOP (8.25 HOURS)

September 25 - 25, 1999

Mediation Association of Tennessee

Phone: (423) 265-3057

MEDIATION ADVOCACY (3 HOURS)

October 18, 1999

Memphis Bar Association and Alternative Dispute Resolution Commission

Phone: (901) 527-3573

This list is constantly being updated. A current list of approved trainings can be found on the Tennessee Supreme Court web page at www.tsc.state.tn.us and also on the Tennessee Bar Association web site at www.tba.org. All CLE approved trainings can be found on the Continuing Legal Education web page at www.cle.tn.com. Search under "mediation".

Ethics Corner

AN APPROVED ATTORNEY MEDIATOR SHOULD BE IDENTIFIED AS A “RULE 31 LISTED MEDIATOR”

Under Formal Ethics Opinion 98-F-142 (a) (issued December 11, 1998), the Board of Professional Responsibility revised its earlier opinion about the proper delineation on letterhead by an approved attorney mediator. The Board concluded that the proper language is “**Rule 31 Listed Mediator.**” In explaining its decision the board stated:

To specifically address whether the attorney may use “Approved Rule 31 Mediator” or “Tennessee Supreme Court Approved Mediator,” this opinion concludes that “Approved Rule 31 Mediator” may be misleading since it does not specifically indicate what body or agency approved the mediator. “Rule 31 Listed Mediator” is not misleading and therefore may be used by the inquiring attorney since the Tennessee Supreme Court has promulgated standards to qualify individuals as a Rule 31 dispute resolution neutral.

Approved mediators who are not also attorneys are encouraged to identify themselves in a similar manner.

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